



## The University of the Pacific Law Review

---

Volume 49 | Issue 2

Article 17

---

1-1-2018

# Chapter 789: Banning the Box: The Solution to High Ex-Offender Unemployment?

Michael Hopkins

Follow this and additional works at: <https://scholarlycommons.pacific.edu/uoplawreview>



Part of the [Legislation Commons](#)

---

### Recommended Citation

Michael Hopkins, *Chapter 789: Banning the Box: The Solution to High Ex-Offender Unemployment?*, 49 U. PAC. L. REV. 513 (2017).  
Available at: <https://scholarlycommons.pacific.edu/uoplawreview/vol49/iss2/17>

This Legislative Review is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in The University of the Pacific Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

## **Chapter 789: Banning the Box: The Solution to High Ex-Offender Unemployment?**

*Michael Hopkins\**

### *Code Sections Affected*

Government Code § 12952 (enacted).

Labor Code § 432.9 (repealed).

AB 1008 (McCarty, Weber, Holden, Gipson, and Reyes); 2017 STAT.

Ch. 789.

### TABLE OF CONTENTS

I. INTRODUCTION .....	513
II. LEGAL BACKGROUND .....	515
A. <i>California Ban-the-Box Statutes</i> .....	515
B. <i>Fair Employment and Housing Council Regulation on         Consideration of Conviction History in Employment Decisions</i> .....	517
C. <i>Other Forms of Ban the Box in the United States</i> .....	518
III. CHAPTER 789 .....	520
IV. ANALYSIS .....	521
A. <i>Challenges for Ex-Offenders in Finding Employment and the         Resulting Larger Effects</i> .....	521
B. <i>Chapter 789's Effect on the Hiring of Ex-Offenders</i> .....	523
1. <i>Chapter 789 Removes Barriers to Employment for Ex-Offenders.</i> ..	524
2. <i>Chapter 789 Will Likely Increase Hiring of Ex-Offenders, But             the Law's Effect May Be Hard to Measure</i> .....	525
C. <i>Chapter 789's Effect on Racial Discrimination in Hiring</i> .....	526
D. <i>Chapter 789's Effect on Employers</i> .....	527
V. CONCLUSION .....	530

### I. INTRODUCTION

As a teenager, Wayne McMahon joined a gang and spent the next 25 years in and out of jail.<sup>1</sup> As a 45-year-old man, McMahon decided to turn his life around.<sup>2</sup>

---

\* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred 2019. Thank you so much to my family and friends for the encouragement and advice throughout law school.

Despite McMahon's decision to leave his past behind, he was only able to secure part-time jobs doing yardwork.<sup>3</sup> McMahon noted, "'Once they see you've been convicted of a felony, they say, 'Don't call us, we'll call you' . . . [y]ou don't get the opportunity to explain to them.'"<sup>4</sup>

McMahon is one of eight million Californians with an arrest or conviction.<sup>5</sup> Many of these people echo McMahon's difficulty in finding steady employment because they may have to check a felony conviction box on a job application and face the stigma associated with a criminal record.<sup>6</sup> The startling fact that one-third of unemployed men have a criminal record demonstrates this difficulty.<sup>7</sup> Employers are passing over ex-offenders although ex-offenders are not more likely to be fired from jobs than non-offenders, and have lower turnover rates than non-offenders.<sup>8</sup> High ex-offender unemployment leads to a variety of negative effects, including decreased public safety.<sup>9</sup> Before Chapter 789, California law prevented only public employers from looking into an applicant's criminal history early in the hiring process.<sup>10</sup> Chapter 789 aims to give ex-offenders a fair shot at finding employment by delaying a public or private employer's inquiry into an applicant's criminal record.<sup>11</sup>

Part II discusses the legal background for Chapter 789 and in doing so lays the groundwork for why Chapter 789 was needed.<sup>12</sup> Part III examines Chapter 789's provisions.<sup>13</sup> Part IV analyzes the challenges ex-offenders have finding

---

1. Alexei Koseff, *Should Your Criminal History Be on Job Applications? Lawmaker Says No*, SACRAMENTO BEE (Mar. 17, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article139018093.html> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. Chuck McFadden, *Hunting for a Job—With a Felony*, CAPITOL WKLY. (May 16, 2017), <http://capitolweekly.net/job-hunting-felony/> (on file with *The University of the Pacific Law Review*).

6. Koseff, *supra* note 1 (describing Manuel La Fontaine's difficulty finding employment after a conviction); Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 195, 197 (May 2009).

7. Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> (on file with *The University of the Pacific Law Review*) (noting a poll finding "[m]en with criminal records account for about 34 percent of all nonworking men ages 25 to 54").

8. Dylan Minor, Nicola Persico & Deborah M. Weiss, *Should You Hire Someone with a Criminal Record?*, KELLOGG SCH. OF MGMT. AT NORTHWESTERN UNIV. (Feb. 3, 2017), <https://insight.kellogg.northwestern.edu/article/should-you-hire-someone-with-a-criminal-record> (on file with *The University of the Pacific Law Review*).

9. *Infra* Part IV.A.

10. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9).

11. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 4 (June 20, 2017).

12. *Infra* Part II.

13. *Infra* Part III.

jobs, the larger effects of these challenges, and Chapter 789's effect on ex-offenders, minority groups, and employers.<sup>14</sup>

## II. LEGAL BACKGROUND

Previous California law<sup>15</sup> delayed a public employer's inquiry into an applicant's conviction history.<sup>16</sup> In recent years, the federal government and a majority of states have adopted forms of this policy—commonly known as “ban the box”<sup>17</sup>—indicating increasing support for the policy.<sup>18</sup> Though most of these ban-the-box laws only apply to public employers,<sup>19</sup> certain states and local jurisdictions have gone further and applied ban-the-box provisions to private employers.<sup>20</sup>

Section A discusses prior and existing California law on the use of criminal history in employment decisions.<sup>21</sup> Section B examines a 2017 California regulation relating to employers' use of conviction history in employment decisions.<sup>22</sup> Section C discusses different forms of ban-the-box policies at the federal level and as adopted by other jurisdictions and private employers.<sup>23</sup>

### A. *California Ban-the-Box Statutes*

In 1975, the California legislature enacted Chapter 1043, a limited form of ban the box.<sup>24</sup> The law prohibits employers, public or private, from asking an

---

14. *Infra* Part IV.

15. This law was repealed by Chapter 789. 2017 Cal. Stat. ch. 789, § 3 (repealing CAL. LAB. CODE § 432.9).

16. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9).

17. The term ban the box “refers to the check box on employment applications asking whether the candidate has ever been convicted of a crime.” Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC'Y FOR HUMAN RESOURCE MGMT., (May 10, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/ban-the-box-movement-viral.aspx> (on file with *The University of the Pacific Law Review*).

18. 5 C.F.R. § 330.1300 (West 2017); *see also* MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T LAW PROJECT, BAN THE BOX 14–15 (2017), *available at* <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> (on file with *The University of the Pacific Law Review*) (indicating there are 27 states with ban-the-box laws).

19. NATIVIDAD RODRIGUEZ & AVERY, *supra* note 18, at 14–15.

20. *Id.* at 17. Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont, as well as local jurisdictions such as San Francisco and Philadelphia, have adopted ban-the-box laws for private employers. *Id.*

21. *Infra* Part II.A.

22. *Infra* Part II.B.

23. *Infra* Part II.C.

24. 1975 Cal. Stat. ch. 1043. Chapter 1043 is a limited ban-the-box law because it addresses “arrests which did not result in conviction,” but the later enacted Chapter 699 addresses convictions. *Id.* at § 2 (enacting CAL. LAB. CODE § 432.7); 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9).

applicant for disclosure of an “arrest which did not result in conviction.”<sup>25</sup> The law also restricts employers from seeking out this information or using it in employment decisions.<sup>26</sup> Chapter 1043 provides fines for violations of its provisions and exempts applicants for peace officer positions.<sup>27</sup> While Chapter 1043 is a first step, it does not address people with criminal convictions,<sup>28</sup> and therefore does nothing to change the employment prospects of people like Wayne McMahon.<sup>29</sup>

California’s legislature addressed this problem in 2013 when it enacted the state’s first full ban-the-box law, Chapter 699.<sup>30</sup> The law aimed to reduce employment barriers for those with criminal convictions and decrease unemployment in areas with concentrated numbers of these people.<sup>31</sup> Chapter 699 prohibited state or local agencies from asking applicants for conviction history information until the agency found the applicant met the minimum qualifications for a position.<sup>32</sup> The law, however, did not apply to private employers.<sup>33</sup> Further, Chapter 699 exempted positions requiring background checks and those with criminal justice agencies.<sup>34</sup> Because Chapter 699’s provisions only applied to public employers,<sup>35</sup> it did not affect people applying for the millions of California jobs in the private sector.<sup>36</sup>

Also in 2013, the California legislature enacted Chapter 721, which expands the limited ban-the-box provision originally enacted by Chapter 1043.<sup>37</sup> Chapter 721 prohibits employers from asking applicants for disclosure of judicially dismissed or sealed convictions, and preserves the fines originally put in place by

---

25. 1975 Cal. Stat. ch. 1043, § 2 (enacting CAL. LAB. CODE § 432.7).

26. *Id.*

27. *Id.*

28. *Id.* (noting language addressing “arrests which did not result in conviction”).

29. See Koseff, *supra* note 1 (describing McMahon’s difficulty finding employment because of his past convictions).

30. 2013 Cal. Stat. ch. 699. Chapter 699 was California’s first full ban-the-box law because the previously enacted Chapter 1043 addresses “arrests which did not result in conviction,” but Chapter 699 addresses convictions. *Id.* at § 2 (enacting CAL. LAB. CODE § 432.9); 1975 Cal. Stat. ch. 1043, § 2 (enacting CAL. LAB. CODE § 432.7).

31. 2013 Cal. Stat. ch. 699, § 1.

32. *Id.* at § 2 (enacting CAL. LAB. CODE § 432.9). Qualifications vary from position to position and can include everything from educational degrees to years of experience. See generally *Attorney Series*, CAL. DEP’T HUM. RESOURCES (Feb. 18, 2015), <http://www.calhr.ca.gov/state-hr-professionals/Pages/5778.aspx> (on file with *The University of the Pacific Law Review*) (describing how the different classifications of the attorney position require membership in the California State Bar and varying years of experience).

33. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9).

34. *Id.*

35. *Id.* (noting language addressing “state or local agenc[ies]”).

36. See SMALL BUS. ADMIN. OFFICE OF ADVOCACY, CALIFORNIA SMALL BUSINESS PROFILE (2016) (noting the over 13 million California jobs in private employment).

37. 2013 Cal. Stat. ch. 721, § 1 (amending CAL. LAB. CODE 432.7).

Chapter 1043 for violations.<sup>38</sup> Although Chapter 721, like Chapter 1043, further limits employer access to disclosure materials, its provisions do nothing for Californians with convictions that have not been judicially dismissed or sealed.<sup>39</sup>

*B. Fair Employment and Housing Council Regulation on Consideration of Conviction History in Employment Decisions*

The Fair Employment and Housing Council (FEHC) promulgated a regulation effective July 1, 2017, that imposes liability on employers who consider a person's conviction history in employment decisions.<sup>40</sup> A person may bring a discrimination claim against an employer for considering conviction history in employment decisions when that consideration has an adverse impact on people in protected classes, such as "gender, race, and national origin."<sup>41</sup> The person bears the burden of proving the adverse impact claim, and one method is citing conviction statistics "showing substantial disparities in the conviction records of one or more" protected categories.<sup>42</sup>

If the person meets this burden, the burden then shifts to the employer.<sup>43</sup> The employer must then justify its decision by showing "it [was] job-related and consistent with business necessity."<sup>44</sup> The employer can meet this burden by showing the consideration of conviction history is tailored for the job and helps measure the person's fitness for the position and potential future performance on the job.<sup>45</sup> Despite an employer meeting this burden, the person may still establish his or her claim if he or she can show a less discriminatory policy is as effective as the employer's consideration of conviction history.<sup>46</sup>

Under the FEHC regulation, before an employer takes adverse action, the employer must give the person notice of the disqualifying conviction and an opportunity to demonstrate the conviction history is inaccurate.<sup>47</sup> The regulation also notes certain employers must consider conviction history under federal or state laws or regulations and identifies these laws and regulations as rebuttable defenses to a claim.<sup>48</sup> While the FEHC regulation covers convictions, unlike

---

38. *Id.*; 1975 Cal. Stat. ch. 1043, § 2 (enacting CAL. LAB. CODE § 432.7).

39. 2013 Cal. Stat. ch. 721, § 1 (amending CAL. LAB. CODE 432.7) (noting the language "conviction[s] that ha[ve] been judicially dismissed or ordered sealed").

40. CAL. CODE REGS. tit. 2, § 11017.1(d) (West 2017).

41. *Id.*

42. *Id.*

43. CAL. CODE REGS. tit. 2, § 11017.1(e)(1) (West 2017).

44. *Id.*

45. *Id.*

46. CAL. CODE REGS. tit. 2, § 11017.1(g) (West 2017).

47. *Id.* § 11017.1(e)(3).

48. *Id.* § 11017.1(f).

Chapter 1043<sup>49</sup> and Chapter 721,<sup>50</sup> and affects private employers, unlike Chapter 699,<sup>51</sup> violations of the regulation may be harder to prove than violations of these laws because the claimant must show an adverse impact on a protected class.<sup>52</sup>

### C. Other Forms of Ban the Box in the United States

Certain federal hiring is also subject to ban-the-box regulation.<sup>53</sup> In late 2016, the United States Office of Personnel Management adopted a regulation that provides agencies may not make inquiries into an applicant's criminal history unless the agency has made a conditional offer of employment.<sup>54</sup> The regulation allows all agencies to request exceptions based on business need if the agency can show "specific job-related reasons" why an applicant's criminal history needs to be considered earlier.<sup>55</sup>

Twenty-seven states have adopted some form of ban-the-box law for public employers through either legislation or executive action.<sup>56</sup> Thirteen of these states further apply their ban-the-box laws to public employers at the city and county level.<sup>57</sup> Unlike California before Chapter 789, certain states like Minnesota require employers notify the applicant when the applicant is denied a position because of a conviction and provide for an appeals process.<sup>58</sup>

Although California's previous ban-the-box law did not apply to private employers, certain ban-the-box laws in other states and local jurisdictions within the state do apply to private employers.<sup>59</sup> Nine states and 15 local jurisdictions have adopted ban-the-box policies for private employers.<sup>60</sup> San Francisco's Fair

---

49. 1975 Cal. Stat. ch. 1043, § 2 (enacting CAL. LAB. CODE § 432.7) (noting language addressing "arrests which did not result in conviction").

50. 2013 Cal. Stat. ch. 721, § 1 (amending CAL. LAB. CODE § 432.7) (noting the language "conviction[s] that ha[ve] been judicially dismissed or ordered sealed").

51. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9) (noting language addressing "state or local agenc[ies]").

52. CAL. CODE REGS. tit. 2, § 11017.1(d) (West 2017).

53. 5 C.F.R. § 330.1300 (West 2017); Eric Lichtblau, *U.S. to Curb Queries on Criminal Histories of Government Job Seekers*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/29/us/politics/criminal-history-job-applicants-prisoners-background-check.html> (on file with *The University of the Pacific Law Review*) (noting the regulation affects half of all federal jobs).

54. 5 C.F.R. § 330.1300 (West 2017).

55. *Id.*

56. NATIVIDAD RODRIGUEZ & AVERY, *supra* note 18, at 14–15.

57. *Id.*

58. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9); MINN. STAT. ANN. §§ 364.05–364.06 (West 2017).

59. NATIVIDAD RODRIGUEZ & AVERY, *supra* note 18, at 17.

60. *Id.* Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont have private employer ban-the-box laws. *Id.* Austin, TX, Baltimore, MD, Buffalo, NY, Chicago, IL, Columbia, MO, the District of Columbia, Los Angeles, CA, Montgomery County, MD, New York, NY, Philadelphia, PA, Portland, OR, Prince George's County, MD, Rochester, NY, San Francisco, CA, and Seattle,

Chance Ordinance, adopted in 2014, applies to private employers with 20 or more employees and prohibits employers from inquiring into an applicant's conviction history or arrests until after the first live interview.<sup>61</sup> Washington D.C.'s Fair Criminal Record Screening Amendment Act of 2014 (FCRSA) prohibits employers with more than ten employees in Washington D.C. from seeking disclosure of an applicant's conviction history until after extending a conditional offer of employment.<sup>62</sup>

State and local governments are not the only entities that have adopted ban-the-box policies; various companies have as well.<sup>63</sup> In 2016, companies such as American Airlines, The Coca-Cola Company, and Starbucks signed then-President Obama's Fair Chance Business Pledge (Pledge).<sup>64</sup> By signing the Pledge, these companies agreed to delay inquiry into an applicant's criminal history.<sup>65</sup> Despite these companies employing over a million people nationwide,<sup>66</sup> the opt-in approach means only applicants applying for positions with pledging companies are affected by the Pledge.<sup>67</sup>

Prior and existing California law failed to help people like Wayne McMahon obtain meaningful employment.<sup>68</sup> Although these laws prevented public employers from considering an applicant's conviction history, the same restriction did not apply to private employers.<sup>69</sup> An FEHC regulation addresses private employers considering an applicant's conviction history, but the regulation may present a high bar because an applicant must show an adverse impact on a protected class.<sup>70</sup>

---

WA also have private employer ban-the-box laws. *Id.*

61. S.F., CAL., POLICE CODE art. 49, §§ 4903, 4904(c) (American Legal Publishing 2017). Live interviews include interviews by "telephone, videoconferencing, use of other technology, or in person." *Id.* at § 4904(c).

62. D.C. CODE ANN. §§ 32-1341, 32-1342 (Westlaw 2017).

63. OFFICE OF THE PRESS SECRETARY, FACT SHEET: WHITE HOUSE LAUNCHES THE FAIR CHANCE BUSINESS PLEDGE (2016).

64. *Id.*

65. *Id.* The exact policy of considering an applicant's criminal history varies from company to company. The Coca-Cola Company does not screen for criminal records until after deciding to hire an applicant, but American Airlines delays criminal history questions until an applicant accepts a conditional offer of employment. *Id.*

66. Lichtblau, *supra* note 53.

67. *See* OFFICE OF THE PRESS SECRETARY, *supra* note 63 (noting how companies pledged to reduce employment barriers for ex-offenders).

68. *See* Koseff, *supra* note 1 (noting ex-offender Wayne McMahon has not been able to find a permanent job since transitioning back into society).

69. 2013 Cal. Stat. ch. 699, § 2 (enacting CAL. LAB. CODE § 432.9).

70. CAL. CODE REGS. tit. 2, § 11017.1(d) (West 2017).



## III. CHAPTER 789

Chapter 789 aims to “‘give people a chance to get their foot in the door’” by “‘remov[ing] . . . arbitrary’” barriers to employment.<sup>71</sup> The law prohibits employers from including criminal history questions on job applications.<sup>72</sup> Chapter 789 also prohibits employers from inquiring into or considering the conviction history of an applicant until the applicant has received a conditional job offer.<sup>73</sup> Chapter 789 restricts employers conducting criminal background checks from “consider[ing], distribut[ing], or disseminat[ing]” certain information.<sup>74</sup> Chapter 789’s provisions apply to public and private sector employers with five or more employees.<sup>75</sup>

Chapter 789 further provides that an employer intending to deny an applicant a job because of conviction history must perform an individualized assessment on the conviction history, not necessarily done in writing.<sup>76</sup> The employer must also notify the applicant of the prospective denial and provide certain information, such as the applicant’s right to respond and challenge the employer’s decision.<sup>77</sup> The applicant is then given five business days to respond to the employer’s notification.<sup>78</sup> An applicant who disputes conviction history in writing may extend the response period another five days.<sup>79</sup> The employer cannot finalize the denial until the response period has passed and must consider the applicant’s response if one is made.<sup>80</sup> If an employer finalizes the decision and denies employment because of the applicant’s conviction history, the employer must notify the applicant and provide certain information, such as the applicant’s right to file a complaint.<sup>81</sup> Chapter 789 also exempts certain positions from its requirements, such as positions with criminal justice agencies.<sup>82</sup>

---

71. Koseff, *supra* note 1 (quoting Assembly Member Kevin McCarty).

72. CAL. GOV’T CODE § 12952(a)(1) (enacted by Chapter 789).

73. *Id.* § 12952(a)(2) (enacted by Chapter 789).

74. *Id.* § 12952(a)(3) (enacted by Chapter 789). This information includes: “(A) Arrest[s] not followed by conviction . . . ; (B) Referral[s] to or participation in a pretrial or posttrial diversion program; (C) Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law.” *Id.*

75. *Id.* § 12952(a) (enacted by Chapter 789).

76. *Id.* § 12952(c) (enacted by Chapter 789). Employers must consider the following criteria when making the individualized assessment: “(i) The nature and gravity of the offense or conduct; (ii) The time that has passed since the offense or conduct and completion of the sentence; (iii) The nature of the job held or sought.” *Id.*

77. *Id.* § 12952(c) (enacted by Chapter 789).

78. *Id.* § 12952(c)(3) (enacted by Chapter 789).

79. *Id.*

80. *Id.* § 12952(c) (enacted by Chapter 789).

81. *Id.* § 12952(c)(5) (enacted by Chapter 789).

82. *Id.* § 12952(d) (enacted by Chapter 789).

Additionally, Chapter 789 repeals the Labor Code provision enacted by Chapter 699.<sup>83</sup> Assembly Members McCarty, Weber, Holden, Gipson, and Reyes introduced Chapter 789 to give the nearly eight million Californians with an arrest or conviction record a fair shot at employment.<sup>84</sup>

#### IV. ANALYSIS

According to Assembly Member Kevin McCarty, a sponsor of Chapter 789, the law is intended to “give applicants with a criminal record the opportunity to be judged on their qualifications not their criminal histories.”<sup>85</sup> Section A examines the challenges ex-offenders have in finding employment and the larger effects of these difficulties.<sup>86</sup> Section B explores whether Chapter 789 will help ex-offenders overcome these challenges and find employment.<sup>87</sup> Section C discusses Chapter 789’s effect on racial discrimination in hiring.<sup>88</sup> Section D addresses Chapter 789’s effects on employer liability and the hiring process.<sup>89</sup>

##### *A. Challenges for Ex-Offenders in Finding Employment and the Resulting Larger Effects*

When a person leaves prison and reenters society, he or she often lacks job skills, work history, and education.<sup>90</sup> Ex-offenders also commonly “return to low-income and predominantly minority communities with relatively few unskilled jobs.”<sup>91</sup> Additionally, their criminal history stigmatizes them in the eyes of potential employers.<sup>92</sup> A study found that employers are less likely to hire a person with a criminal record than any other disadvantaged group, with only 40% of surveyed employers willing to consider hiring an ex-offender.<sup>93</sup> These circumstances facing ex-offenders can greatly impair their ability to find employment.<sup>94</sup>

---

83. 2017 Cal. Stat. ch. 789, § 3 (repealing CAL. LAB. CODE § 432.9).

84. AB 1008 (McCARTY) FAIR CHANCE ACT, FACT SHEET 1–2 (2017).

85. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 4 (June 20, 2017).

86. *Infra* Part IV.A.

87. *Infra* Part IV.B.

88. *Infra* Part IV.C.

89. *Infra* Part IV.D.

90. HARRY HOLZER, STEVEN RAPHAEL & MICHAEL STOLL, EMPLOYMENT BARRIERS FACING EX-OFFENDERS 4 (May 19–20, 2003), available at <http://www.urban.org/sites/default/files/publication/59416/410855-Employment-Barriers-Facing-Ex-Offenders.PDF> (on file with *The University of the Pacific Law Review*).

91. *Id.* at 6.

92. Pager, Western & Sugie, *supra* note 6, at 197.

93. HOLZER, RAPHAEL & STOLL, *supra* note 90, at 11.

94. *Id.* at 4, 11.

The high rate of unemployment among ex-offenders—around two-thirds of male ex-offenders are unemployed a year after reentry—highlights the challenge ex-offenders have finding jobs.<sup>95</sup> The high ex-offender unemployment rate, combined with the high number of ex-offenders, has a variety of negative economic effects.<sup>96</sup> For example, the difficulty ex-offenders face finding jobs affects the economy as well as tax dollars.<sup>97</sup> One study estimated reductions in employment resulting from employment barriers for ex-offenders cost the United States economy between “\$78 [and] \$87 billion in annual GDP.”<sup>98</sup> Besides negative effects on the economy, ex-offenders have less economic mobility and earn less than non-offenders, resulting in lower income tax revenue.<sup>99</sup> Further, due to low employment levels, the government may spend tax dollars on public assistance for ex-offenders, since many ex-offenders report receiving public assistance.<sup>100</sup> Not addressing these barriers means failing to address these negative economic effects.<sup>101</sup>

Barriers to ex-offender employment also create public safety risks.<sup>102</sup> Research has found providing employment opportunities to ex-offenders significantly reduces recidivism rates.<sup>103</sup> This decrease in recidivism rates suggests that failing to provide employment opportunities to ex-offenders increases the odds of ex-offenders committing other crimes and endangering public safety.<sup>104</sup> The difficulty ex-offenders experience finding employment

---

95. Pager, Western & Sugie, *supra* note 6, at 195.

96. CHERRIE BUCKNOR & ALAN BARBER, *THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 1* (2016), available at <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf?v=5> (on file with *The University of the Pacific Law Review*) (noting a working age population of between 14 and 15.8 million former felons).

97. *Id.*; see also THE PEW CHARITABLE TRUSTS, *COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 12* (2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf) (on file with *The University of the Pacific Law Review*) (finding incarceration eliminates approximately half the earnings a man would have otherwise earned).

98. BUCKNOR & BARBER, *supra* note 96, at 1.

99. See THE PEW CHARITABLE TRUSTS, *supra* note 97, at 12 (noting former inmates have earned \$179,000 less than non-inmates by age 48).

100. See NANCY G. LA VIGNE, LISA E. BROOKS & TRACEY L. SHOLLENBERGER, *WOMEN ON THE OUTSIDE: UNDERSTANDING THE EXPERIENCES OF FEMALE PRISONERS RETURNING TO HOUSTON, TEXAS 7* (2009), available at <http://www.urban.org/sites/default/files/publication/30401/411902-Women-on-the-Outside-Understanding-the-Experiences-of-Female-Prisoners-Returning-to-Houston-Texas.PDF> (on file with *The University of the Pacific Law Review*) (noting 18 percent of surveyed female former prisoners in Texas reported receiving public assistance less than a year after release).

101. See BUCKNOR & BARBER, *supra* note 96, at 1 (finding negative effects on the employment rate and annual GDP due to ex-offender employment barriers).

102. Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J. OF L. & ECON. 259, 280 (2001) (noting unemployment is an important factor in property crime rates).

103. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 542 (2000).

104. See *id.* (finding providing employment opportunities to ex-offenders reduces recidivism).

affects the general public because crime levels decrease when ex-offenders can easily find jobs.<sup>105</sup> By leaving these barriers in place, the risk of recidivism—the commission of additional crimes—goes up.<sup>106</sup>

Obstacles to employment can also affect the physical and mental health of ex-offenders.<sup>107</sup> Because a criminal record creates difficulty in obtaining employment,<sup>108</sup> ex-offenders may be more likely to experience depression.<sup>109</sup> Researchers found unemployment makes people more anxious and depressed and leads to accompanying physical symptoms, such as sleep deprivation.<sup>110</sup> Because unemployment negatively affects a person's health, reducing ex-offenders' employment barriers may improve the health of ex-offenders.<sup>111</sup>

Chapter 789 tries to reduce these barriers to employment.<sup>112</sup> By reducing these barriers, Chapter 789 will help alleviate the negative effects on the economy, public safety, and the health of ex-offenders.<sup>113</sup>

#### *B. Chapter 789's Effect on the Hiring of Ex-Offenders*

Proponents of Chapter 789 claim the law helps ex-offenders find jobs.<sup>114</sup> For Chapter 789 to accomplish this goal, the law's effect on the hiring process must result in employers hiring greater numbers of ex-offenders.<sup>115</sup> Subsection 1 analyzes how Chapter 789 removes barriers to employment.<sup>116</sup> Subsection 2 focuses on how Chapter 789 will likely lead to increased hiring of ex-offenders.<sup>117</sup>

---

105. *See id.* (indicating employment is a "turning point in the life course of criminal offenders" and makes offenders less likely to reoffend).

106. *See id.* (noting providing employment opportunities to ex-offenders reduces recidivism).

107. *See* Margaret W. Linn, Richard Sandifer & Shayna Stein, *Effects of Unemployment on Mental and Physical Health*, 75 AM. J. PUB. HEALTH 502, 504 (1985) (indicating unemployment can have negative physical and mental effects).

108. HOLZER, RAPHAEL & STOLL, *supra* note 90, at 11.

109. *See* Linn, Sandifer & Stein, *supra* note 107, at 504 (noting unemployment increases rates of depression for unemployed people).

110. *Id.*

111. *See id.* (finding unemployment negatively affects unemployed people's physical and mental health).

112. *See* CAL. GOV'T CODE § 12952(a) (enacted by Chapter 789) (delaying employer inquiry into the criminal history of applicants).

113. *See* BUCKNOR & BARBER, *supra* note 96, at 1 (finding negative effects on the employment rate and annual GDP due to ex-offender employment barriers); Uggen, *supra* note 103, at 542 (indicating providing employment opportunities to ex-offenders reduces recidivism); Linn, Sandifer & Stein, *supra* note 107, at 504 (noting unemployment negatively affects unemployed people's physical and mental health).

114. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 5 (June 20, 2017).

115. *See* CAL. GOV'T CODE § 12952(a) (enacted by Chapter 789) (delaying employer inquiry into the criminal history of applicants).

116. *Infra* Part IV.B.1.

117. *Infra* Part IV.B.2.

1. Chapter 789 Removes Barriers to Employment for Ex-Offenders

Chapter 789 delays employer inquiry into an applicant's criminal history until a conditional offer of employment is made.<sup>118</sup> As part of this delay, Chapter 789 requires employers remove questions seeking information about an applicant's criminal history from job applications.<sup>119</sup> This means employers cannot reject an ex-offender at the application stage because of his or her criminal history unless the ex-offender chooses to disclose this information.<sup>120</sup>

An applicant moving past the application stage progresses to the interview stage of the hiring process.<sup>121</sup> Even though an applicant may be able to make up for his or her criminal record during an interview,<sup>122</sup> an interviewer may be more likely to ascribe negative characteristics to the applicant if the interviewer knows of the applicant's criminal record.<sup>123</sup> Therefore, an ex-offender's chances of finding employment are greater when the employer is unaware of his or her criminal history until after the interview.<sup>124</sup> Chapter 789 does just that by prohibiting employers from inquiring into criminal records until after the interview stage of the hiring process.<sup>125</sup> The employer must first decide to hire the applicant and extend a conditional offer of employment before the employer can inquire into criminal records.<sup>126</sup> Chapter 789 increases the likelihood of employers hiring ex-offenders because the employer bases the hiring decision solely on qualifications and experience, not on arrests or convictions.<sup>127</sup>

---

118. CAL. GOV'T CODE § 12952(a) (enacted by Chapter 789).

119. *Id.* § 12952(a)(1) (enacted by Chapter 789)

120. *See* McFadden, *supra* note 5 (noting AB 1008 would prohibit employers from asking applicants about criminal convictions on an initial application).

121. Alison Doyle, *Recruitment and Hiring Process*, THE BALANCE (May 30, 2017), <https://www.thebalance.com/recruitment-and-hiring-process-2062875> (on file with *The University of the Pacific Law Review*).

122. Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175, 193–94 (2015) (discussing how applicants during an interview can offset having a criminal record with their personality or character).

123. Pager, Western & Sugie, *supra* note 6, at 197.

124. *See id.* (finding employers may ask fewer interview questions to stereotyped applicants or “provide less opportunity for the applicant[s] to present [their] profile[s] in the best light”).

125. CAL. GOV'T CODE § 12952(a)(2) (enacted by Chapter 789).

126. *Id.*

127. *See* SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 4 (June 20, 2017) (noting Assembly Member McCarty intended AB 1008 to “give applicants with a criminal record the opportunity to be judged on their qualifications not their criminal histories”).

2. *Chapter 789 Will Likely Increase Hiring of Ex-Offenders, But the Law's Effect May Be Hard to Measure*

Research suggests ban-the-box laws achieve their objectives,<sup>128</sup> resulting in increased hiring of ex-offenders.<sup>129</sup> For example, after Washington D.C. instituted the FCRSA, District agencies hired 33% more ex-offenders.<sup>130</sup> Further, after San Francisco adopted its Fair Chance Ordinance, nearly one-fifth of employers surveyed changed their hiring processes, leading a report to conclude “it is likely that the law is helping individuals with criminal conviction histories better access stable employment.”<sup>131</sup> Given the positive effects of ban-the-box laws elsewhere, Chapter 789 will likely result in increased hiring of ex-offenders.<sup>132</sup>

Although Chapter 789 will likely increase the hiring of ex-offenders, this increase may partially be due to changing trends in the way employers hire.<sup>133</sup> Because of the FEHC regulation about employer usage of conviction history in employment decisions, a human resources membership association advised employers to exercise caution when using criminal background checks for applicants.<sup>134</sup> Although most employers continue to conduct criminal background checks when hiring, a growing percentage of employers forgo these checks.<sup>135</sup>

---

128. DANIEL SHOAG AND STAN VEUGER, *THE LABOR MARKET CONSEQUENCES OF BANS ON CRIMINAL RECORD SCREENING IN EMPLOYMENT APPLICATIONS* 15, 28 (2016), available at <https://scholar.harvard.edu/files/shoag/files/banning-the-box-september-2016.pdf> (on file with *The University of the Pacific Law Review*). In the absence of national data for people with criminal records, the researchers examined data for residents of high-crime neighborhoods and found as much as a four percent increase in employment because of ban-the-box laws. *Id.*

129. KATHLEEN PATTERSON, OFFICE OF THE D.C. AUDITOR, *THE IMPACT OF “BAN THE BOX” IN THE DISTRICT OF COLUMBIA* 16 (2016), available at [http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report\\_0.pdf](http://www.dcauditor.org/sites/default/files/FCRSA%20-%20Ban%20the%20Box%20Report_0.pdf) (on file with *The University of the Pacific Law Review*); FAIR CHANCE HIRING IN SAN FRANCISCO: YEAR ONE OF THE SAN FRANCISCO FAIR CHANCE ORDINANCE 9 (2016), available at <https://sfgov.org/olse/sites/default/files/FCO%20First%20Year%20Report.pdf> [hereinafter FAIR CHANCE HIRING] (on file with *The University of the Pacific Law Review*).

130. PATTERSON, *supra* note 129, at 16.

131. FAIR CHANCE HIRING, *supra* note 129, at 9.

132. See PATTERSON, *supra* note 129, at 16 (indicating Washington D.C.’s ban-the-box law increased ex-offender hiring); FAIR CHANCE HIRING, *supra* note 129, at 9 (noting San Francisco’s ban-the-box law likely helped ex-offenders find jobs).

133. See *SHRM Finds Fewer Employers Using Background Checks in Hiring*, SOC’Y FOR HUMAN RESOURCE MGMT. (July 19, 2012), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/backgroundchecks.aspx> (on file with *The University of the Pacific Law Review*) (noting an increase in the percentage of employers forgoing criminal background checks on applicants).

134. David Abella & Sarah Nichols, *California Employers May Want to Reexamine Background Check Policies*, SOC’Y FOR HUMAN RESOURCE MGMT. (Jan. 3, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-background-check-policies.aspx> (on file with *The University of the Pacific Law Review*).

135. *SHRM Finds Fewer Employers Using Background Checks in Hiring*, *supra* note 133 (finding 87 percent of employers conduct criminal background checks on all or select job candidates, but noting a seven percent increase over the past two years of employers forgoing criminal background checks). However, this

This trend away from the use of criminal background checks may be another cause of any increase in the hiring of ex-offenders, making Chapter 789's effect harder to measure.<sup>136</sup>

C. Chapter 789's Effect on Racial Discrimination in Hiring

Chapter 789's proponents discuss how African Americans and Latinos face discrimination in the criminal justice system, resulting in a disproportionate number having a criminal record.<sup>137</sup> Because Chapter 789 reduces barriers to employment for people with criminal records, minority groups will seemingly benefit from Chapter 789.<sup>138</sup> Research, however, shows ban-the-box laws may negatively affect minority job applicants.<sup>139</sup>

One study showed that employers unaffected by ban-the-box laws gave callbacks to white male applicants at a higher rate than African American male applicants.<sup>140</sup> But, this higher rate of callbacks for white male applicants greatly increased when looking at employers affected by ban-the-box laws, revealing that ban-the-box laws increased callbacks for white male applicants while reducing callbacks for black male applicants.<sup>141</sup> The researchers theorized that ban-the-box laws led to employers treating "all black male applicants as if they have a high probability of having a record."<sup>142</sup> Therefore, there is at least some evidence that Chapter 789 may increase hiring discrimination.<sup>143</sup>

While research has shown ban-the-box laws can increase discrimination in hiring, this research is not without criticism.<sup>144</sup> The National Employment Law

---

increase in employers forgoing criminal background checks may in part be due to ban-the-box laws, rather than employers voluntarily forgoing these checks. See Roy Maurer, *Know Before You Hire: 2017 Employment Screening Trends*, SOC'Y FOR HUMAN RESOURCE MGMT. (Jan. 25, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/2017-employment-screening-trends.aspx> (on file with *The University of the Pacific Law Review*) (stating employers conducting "background checks in 2017 will have to adapt to the growth of the ban-the-box movement").

136. See *SHRM Finds Fewer Employers Using Background Checks in Hiring*, *supra* note 133 (finding an increasing percentage of employers forgoing criminal background checks).

137. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 5 (June 20, 2017).

138. See *supra* Part IV.B.1 (concluding Chapter 789 increases the likelihood employers hire ex-offenders).

139. AMANDA AGAN & SONJA STARR, BAN THE BOX, CRIMINAL RECORDS, AND STATISTICAL DISCRIMINATION: A FIELD EXPERIMENT 24 (2016), available at [https://law.yale.edu/system/files/area/workshop/leo/leo16\\_starr.pdf](https://law.yale.edu/system/files/area/workshop/leo/leo16_starr.pdf) (on file with *The University of the Pacific Law Review*).

140. *Id.* (finding employers not affected by ban-the-box laws gave callbacks to white male applicants at a seven percent higher rate than African American male applicants).

141. *Id.* at 24–25 (finding employers affected by ban-the-box laws gave callbacks to white male applicants at a 45 percent higher rate than African American male applicants).

142. *Id.* at 24.

143. See *id.* (finding increased racial discrimination as a result of ban-the-box laws).

144. Maurice Emsellem & Beth Avery, *Racial Profiling in Hiring: A Critique of New "Ban the Box"*

Project (NELP), a co-sponsor of Chapter 789, points to racial discrimination in hiring as the culprit behind these differences in callback rates, not ban-the-box laws.<sup>145</sup> Instead of abandoning these laws, the NELP calls for enacting ban-the-box laws along with aggressive enforcement of anti-discrimination laws.<sup>146</sup> Because of the conflicting analyses of these studies, it is unclear whether Chapter 789 will affect racial discrimination in hiring.<sup>147</sup>

#### *D. Chapter 789's Effect on Employers*

Although Chapter 789 will likely benefit ex-offenders by helping them find employment,<sup>148</sup> the law is not without its opponents.<sup>149</sup> Critics claim Chapter 789 has many negative effects, such as increased liability for employers and a slower, more expensive hiring process.<sup>150</sup>

The California Chamber of Commerce stated Chapter 789 increases liability for negligent hiring if an ex-offender commits workplace violence.<sup>151</sup> Under the tort of negligent hiring, an employer can be liable for harm caused by an employee “if the employer has reason to know that the employee, because of his or her qualities, is likely to harm others.”<sup>152</sup> Conducting a criminal background check is a way for an employer to investigate whether an applicant is dangerous, showing that the employer did not have reason to know of his or her dangerous tendencies if harm occurs.<sup>153</sup> Therefore, criminal background checks help employers reduce negligent hiring claims.<sup>154</sup> By restricting a tool used to reduce

---

*Studies*, NAT'L EMP'T LAW PROJECT, at 1 (Aug. 2016), available at <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profilng-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf> (on file with *The University of the Pacific Law Review*).

145. *Id.* at 3.

146. *Id.* at 6–7.

147. See AGAN & STARR, *supra* note 139, at 24 (“[O]ur findings also provide evidence of a serious apparent unintended consequence of BTB: increased racial discrimination.”). But see Emsellem & Avery, *supra* note 144, at 3 (calling the Agan & Starr conclusion “questionable”).

148. *Supra* Part IV.B.2.

149. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1008, at 13–14 (July 11, 2017).

150. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF AB 1008, at 8 (May 3, 2017); Vin Gurrieri, 3 ‘Ban the Box’ Mishaps Employers Should Steer Clear Of, LAW 360 (June 2, 2017), <https://www.law360.com/articles/930406/3-ban-the-box-mishaps-employers-should-steer-clear-of> (on file with *The University of the Pacific Law Review*).

151. ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF AB 1008, at 8 (May 3, 2017).

152. 29 CAL. JUR. 3D *Employer and Employee* § 190 (2017).

153. See Susan Heathfield, *What Are Negligent Hiring Claims?*, THE BALANCE (Mar. 23, 2017), <https://www.thebalance.com/what-are-negligent-hiring-claims-1918018> (on file with *The University of the Pacific Law Review*) (“[A] negligent hiring claim is made when the filer believes that the employer should have known about the employee’s background . . . the filer attempts to prove that the injurious behavior was to be expected based on past behavior that demonstrated that the employee was dangerous, untrustworthy, a sexual predator, or a thief, to name a few possible claims.”).

154. *Negligent Hiring Law and Legal Definition*, USLEGAL, INC., <https://definitions.uslegal.com/n/>



negligent hiring claims, Chapter 789 may make employers more vulnerable to lawsuits.<sup>155</sup>

Though Chapter 789 places restrictions on criminal background checks, the law does not prohibit these checks, but delays when an employer can conduct them.<sup>156</sup> Because employers can still use criminal background checks to vet applicants, it is questionable whether Chapter 789 will increase the risk of negligent hiring liability.<sup>157</sup> A growing percentage of employers are forgoing criminal background checks, further calling into question whether Chapter 789 will increase negligent hiring liability.<sup>158</sup> Because more employers are forgoing criminal background checks, employers may view these checks as less necessary to reducing negligent hiring liability.<sup>159</sup>

Opponents further claim Chapter 789 imposes new requirements which can slow the hiring process and make it more expensive.<sup>160</sup> For example, Chapter 789's required response period increases the hiring process length by at least five business days when the employer intends to deny an applicant a job because of a conviction.<sup>161</sup> Chapter 789's employer notification requirements may also add delays and expense.<sup>162</sup> If an employer intends to deny an applicant a job because of a conviction, the employer must now take the time to notify the applicant at both the prospective and final denial stages.<sup>163</sup>

Although employers must comply with Chapter 789's added requirements, reports on other jurisdictions' ban-the-box laws revealed minor effect on employers.<sup>164</sup> A report on Washington D.C.'s FCRSA found the majority of

---

negligent-hiring/ (last visited Nov. 26, 2017) (on file with *The University of the Pacific Law Review*).

155. See Heathfield, *supra* note 153 ("Employers are most vulnerable to negligent hiring claims if they fail to . . . do a criminal background check on potential employees.").

156. CAL. GOV'T CODE § 12952(a), (b) (enacted by Chapter 789).

157. See *id.* ("This section shall not be construed to prevent an employer from conducting a conviction history background check not in conflict with the provisions of subdivision (a).").

158. See *SHRM Finds Fewer Employers Using Background Checks in Hiring*, *supra* note 133 (finding the percentage of employers that choose not to conduct criminal background checks increased "from 7 percent in 2010 to 14 percent in 2012").

159. See *id.* (indicating an increasing percentage of employers are forgoing criminal background checks when hiring). However, this increase in employers forgoing criminal background checks may in part be due to ban-the-box laws, rather than employers voluntarily choosing to forgo these checks. See also Maurer, *supra* note 135 ("Human resource professionals conducting pre-employment background checks in 2017 will have to adapt to the growth of the ban-the-box movement.").

160. See ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT, COMMITTEE ANALYSIS OF AB 1008, at 8 (May 3, 2017) (noting opponents of AB 1008 claimed the bill "expands current hiring requirements related to background checks significantly, delays hiring schedules, and opens the door to liability and litigation.").

161. CAL. GOV'T CODE § 12952(c)(3) (enacted by Chapter 789).

162. See *id.* § 12952(c) (listing the requirements for denying an applicant based on his or her criminal history).

163. *Id.*

164. See, e.g., PATTERSON, *supra* note 129, at 18 (explaining the majority of businesses surveyed reported no effects or minor effects due to Washington D.C.'s ban-the-box law); FAIR CHANCE HIRING, *supra*

businesses reported little effect on their operations, however, around a third of business reported hiring burdens due to the FCRSA.<sup>165</sup> A report on San Francisco's Fair Chance Ordinance found minor effects on employers because only a smaller number of employers needed to change their application process to comply with the law.<sup>166</sup>

Chapter 789's individualized assessment requirement places another burden on employers who intend to deny an applicant based on conviction history.<sup>167</sup> This added burden may be minor because no proof is required—employer assessments do not have to be committed to writing.<sup>168</sup> Although Chapter 789 will likely impose burdens on some employers because of the added requirements on the hiring process,<sup>169</sup> reports on the effects of other ban-the-box laws show many businesses may remain relatively unaffected by Chapter 789.<sup>170</sup>

Chapter 789 may impose extra burdens to businesses operating in both California and other states because it creates further differences in hiring laws.<sup>171</sup> For example, the procedure for withdrawing a conditional offer of employment is different under Chapter 789 than Washington D.C.'s FCRSA.<sup>172</sup> To ensure compliance, an employer must stay up-to-date on these differences in hiring laws and either craft a separate hiring policy for each jurisdiction or adhere to the strictest hiring law in every jurisdiction the employer operates.<sup>173</sup> Because Chapter 789 will lead to more hiring law differences with other states, Chapter

---

note 129, at 7–8 (reporting the majority of employers did not have to alter their application process because of San Francisco's ban-the-box law).

165. PATTERSON, *supra* note 129, at 18 (finding 68 percent of surveyed businesses reported the ban-the-box law affected hiring processes "somewhat" or "not at all," but 37 percent of surveyed businesses reported at least one of three burdens due to the FCRSA: additional steps in the hiring process, increased length of the hiring process, and increased expenses).

166. FAIR CHANCE HIRING, *supra* note 129, at 7–8 (finding 17.9 percent of employers changed their hiring process due to the Fair Chance Ordinance).

167. CAL. GOV'T CODE § 12952(c) (enacted by Chapter 789).

168. *See id.* § 12952(c)(1)(b) ("An employer may, but is not required to, commit the results of this individualized assessment to writing.").

169. *See id.* § 12952(c) (requiring employers follow specified procedural and notification steps during the hiring process).

170. *See* PATTERSON, *supra* note 129, at 18 (noting the majority of surveyed businesses reported Washington D.C.'s ban-the-box law affected hiring processes "somewhat" or "not at all"); FAIR CHANCE HIRING, *supra* note 129, at 7–8 (indicating 17.9 percent of employers changed their hiring process due to San Francisco's ban-the-box law).

171. *See* Maurer, *supra* note 17 ("Employers now have to comply with a dizzying number of variations on banning the box, not only from state to state, but city to city").

172. CAL. GOV'T CODE § 12952(c) (enacted by Chapter 789); D.C. CODE ANN. §32-1342 (Westlaw 2017).

173. Amy Messigian & Katrina Walasik, *Increasing Criminal Background Check Requirements Pose Challenges for National Retailers*, NAT'L L. REV. (June 30, 2017), available at <https://www.natlawreview.com/article/increasing-criminal-background-check-requirements-pose-challenges-national-retailers> (on file with *The University of the Pacific Law Review*); Maurer, *supra* note 17.

789 will likely create extra burdens on businesses operating in both California and other states.<sup>174</sup>

Ex-offenders face difficulty finding jobs, and the resulting high ex-offender unemployment has larger effects, such as decreased public safety.<sup>175</sup> Chapter 789 targets barriers to employment and intends to help ex-offenders find jobs.<sup>176</sup> The law will likely have positive effects, such as increasing hiring of ex-offenders, but may also have negative impacts, including the risk of increased racial discrimination in hiring and added delay and expense in the hiring process.<sup>177</sup>

## V. CONCLUSION

In enacting Chapter 699, the California legislature declared reducing employment barriers for ex-offenders was a “[matter] of statewide concern.”<sup>178</sup> Chapter 699, however, only prevented public employers from considering conviction history in hiring and left a gap for private employers.<sup>179</sup> Other existing law that affects private employers does not address convictions.<sup>180</sup> Chapter 789 fills these gaps and, in doing so, addresses this matter of statewide concern.<sup>181</sup>

Ex-offenders face many barriers when it comes to finding jobs.<sup>182</sup> These barriers result in high rates of ex-offender unemployment, which leads to a variety of negative effects, such as decreased public safety.<sup>183</sup> Chapter 789 aims to reduce these barriers and give ex-offenders a fair shot at finding employment through measures such as preventing employers from asking for disclosure of criminal history on job applications.<sup>184</sup> If other jurisdictions are any indication, Chapter 789 will likely achieve its goal and boost ex-offender employment.<sup>185</sup> While Chapter 789 benefits ex-offenders, there is at least some risk minority

---

174. See Maurer, *supra* note 17 (“Companies doing business in multiple jurisdictions now have to consider the law and policy of each location, possibly having different processes depending on where they’re located”).

175. *Supra* Part IV.A.

176. See SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 4 (June 20, 2017) (“The author states that the intent of AB 1008 is to give applicants with a criminal record the opportunity to be judged on their qualifications not their criminal histories.”).

177. *Supra* Part IV.B.2; *supra* Part IV.C; *supra* Part IV.D.

178. 2013 Cal. Stat. ch. 699, § 1.

179. *Id.* at § 2 (enacting CAL. LAB. CODE § 432.9).

180. CAL. LAB. CODE § 432.7(a) (enacted by 1975 Cal. Stat. ch. 1043)

181. See CAL. GOV’T CODE § 12952(a) (enacted by Chapter 789) (noting how the law addresses “conviction history”).

182. *Supra* Part IV.A.

183. *Supra* Part IV.A.

184. SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS, COMMITTEE ANALYSIS OF AB 1008, at 4 (June 20, 2017).

185. *Supra* Part IV.B.2.

groups may face increased hiring discrimination due to Chapter 789.<sup>186</sup> On the employer side, Chapter 789 adds notification and procedural requirements to the hiring process that will likely impose burdens on many employers.<sup>187</sup> Therefore, Chapter 789's success in helping ex-offenders find jobs comes at a cost.<sup>188</sup> Though Chapter 789 delays employers from investigating an applicant's criminal history, it does not prohibit the inquiry.<sup>189</sup> Thus, past convictions may remain an obstacle to employment for ex-offenders like Wayne McMahon.<sup>190</sup>

---

186. *Supra* Part IV.C.

187. *Supra* Part IV.D.

188. *Supra* Part IV.B.2; *supra* Part IV.C; *supra* Part IV.D.

189. CAL. GOV'T CODE § 12952(a), (b) (enacted by Chapter 789).

190. *See id.* (providing that an employer can run criminal background checks on applicants if the employer follows specified steps).